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Supreme Court, U.S.
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No. 97-7164

In The
Supreme Court of the United States
October Term, 1997

FRANCOIS HOLLOWAY, also known as ABDU ALI,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the specific intent to cause physical harm or death contained as an essential element in the carjacking statute encompasses an intent which is only conditional.

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (J.A. 48-73) is reported at 126 F.3d 82. The opinion of the United States District Court for the Eastern District of New York (J.A. 32-47) is reported at 921 F. Supp. 155.

STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner appeals from an order of the United States Court of Appeals for the Second Circuit filed on September 16, 1997, (the mandate was issued on October 7, 1997) which affirmed, in a majority opinion, the judgment of the United States District Court, Eastern District of New York (Gleeson, J.) entered on August 28, 1996, upon a jury verdict convicting petitioner of conspiracy to operate (18 U.S.C. § 371) and the operation of a chop shop (18 U.S.C. § 2322), three separate counts of carjacking (18 U.S.C. § 2119); and three separate counts of the use of a firearm during a crime of violence (18 U.S.C. § 924(c)(1)).

Petitioner was sentenced to 60 months on his conviction of conspiracy, concurrent sentences of 151 months on his convictions for operating a chop shop and his conviction for the three carjacking counts and consecutive 5, 20 and 20 year sentences on his convictions under three separate § 924(c) counts.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The petition for certiorari was granted on April 27, 1998.

STATUTES INVOLVED

In 1992, 18 U.S.C. § 2119 stated:

Whoever, possessing a firearm as defined in section 921 of this Title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so shall -

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life or both.

The Violent Crime Control and Law Enforcement Act of 1994 amended the statute in the following manner:

(14) CARJACKING - Section 2119(3) of Title 18, United States Code is amended by striking the period after "both" and inserting, "or sentenced to death."; and by striking, "possessing a firearm as defined in Section 921 of this Title," and inserting, "with the intent to cause death or serious bodily harm".

18 U.S.C. § 2119 now reads:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that

has been transported, shipped, or received in interstate or foreign commerce from the person or the presence of another by force, and violence or by intimidation, or attempts to do so, shall -

(1) be fined under the title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate Section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

STATEMENT OF THE CASE

Proceedings in the District Court

Petitioner, FRANCOIS HOLLOWAY, a/k/a ABDU ALI, was indicted in the Eastern District of New York for the crimes of conspiracy to operate (18 U.S.C. § 371) and the operation of a chop shop (18 U.S.C. § 2322) (Counts 1 and 2 of the indictment filed against him and several other codefendants), three separate counts of carjacking (18 U.S.C. § 2119) (Counts 7, 9, and 11 of the indictment); and three separate counts of the use of a firearm during a crime of violence (18 U.S.C. § 924(c)(1)) (Counts 8, 10 and 12 of the indictment). J.A. 4-6, 8-10.

During petitioner's jury trial, the primary witness against petitioner was the cooperating co-defendant Vernon Lennon. Lennon testified pursuant to a cooperation agreement with the government which involved a plea of guilty to two counts of the instant indictment, a single carjacking count and a 924(c) count. (107-08).¹

Lennon testified that in 1994 he observed petitioner frequenting a chop shop where a codefendant Arnold dismantled cars. (96). Lennon related that pursuant to the request of his father, he began stealing cars which were to be taken to the chop shop for dismantling.

Lennon testified that at one time he had a conversation with petitioner in which he informed the latter that he carried a gun during his robberies of vehicles and even displayed his .32 caliber revolver to petitioner. He also related that both petitioner and Lennon were told to steal specific vehicles by Arnold. (103-04).

Lennon related that the crimes he committed with petitioner included the carjacking of a Toyota Celica (Count 11), a Mercedes Benz (Count 9), and a Maxima (Count 7). (115).

Lennon described the taking of the Maxima. (Count 7). He related that he and petitioner followed the vehicle and, after observing the driver exit the car, Lennon approached him and pointed a gun, whereupon the victim dropped the keys. Lennon retrieved the keys and drove the vehicle to the chop shop location. During the crime, petitioner remained seated in a waiting vehicle

¹ Parenthetical references are to the trial transcript.

which he had driven to the location with Lennon. Although Lennon indicated that he was prepared to use the gun if the victim "had tried something", there was no actual intent to cause anyone serious injury during the event. (118-20).

Lennon also described the taking of the Mercedes Benz. (Count 9). In the course of this event, Lennon pointed a gun at the driver of the car, who had exited his vehicle, whereupon Lennon threatened to shoot him if he did not relinquish his keys. Lennon was accompanied by petitioner who struck the owner of the car in the face when he hesitated by backing away from the twosome. Lennon then took the Mercedes while petitioner followed behind in another vehicle. The victim did not suffer an injury which required medical treatment. There was no other conduct or words spoken in the course of this incident which manifested an intent to cause serious bodily injury. (120-27).

Lennon also testified concerning the theft of the Toyota Celica during which he and petitioner approached a driver and Lennon demanded her keys. The driver abandoned the vehicle while leaving the keys inside the car. Consequently, Lennon was able to steal the automobile without even displaying a firearm during the crime. (130-34). (Count 11).

Lennon never testified that either he or petitioner possessed an unconditional intent to harm any of the drivers of the stolen vehicles. In fact, the desired objective was to steal the vehicle without having to harm the victim. (135-40). The government never challenged Lennon's assertions that the intent to cause harm was

entirely conditioned upon resistance which never materialized.

Lennon testified that, with all of his car robberies, his plan was the same. He would display a gun in an effort to scare his victims into relinquishing their keys to their vehicle. He never intended to shoot his victims and the objective was to leave the owners of the vehicles unharmed. Although he was prepared to use his gun if the circumstances warranted its use, such circumstances never arose in any of the robberies in which he and petitioner were involved. (144-53).

Lennon also conceded that it was always he, not petitioner, who possessed a weapon during the carjackings. Lennon never testified that he informed petitioner that the gun was loaded. (158).

The government presented testimony from the victims of the carjackings, including Ruben Rodriguez. Rodriguez testified that he was struck in the face during the carjacking of his Mercedes. Rodriguez confirmed that he did not receive any medical treatment and that no shots were fired when he fled. (51-55).

The Rule 29 Motion

Following the presentation of the government's case, defense counsel moved for a dismissal of all carjacking and gun counts charged in the indictment (Counts 7 through 12), on the ground that the government failed to present legally sufficient proof that petitioner acted with the statutorily required specific intent to cause death or

serious bodily harm to any of the victims of the carjackings. Defense counsel argued that the cooperating witness testified that, during the commission of the thefts, it was never his intent to cause death or serious bodily harm. Moreover, he maintained that a "conditional intent" to cause harm had the carjackings been resisted failed to establish the specific intent element of the crime.

Defense counsel also argued that the concept of conditional intent was not provided for in the carjacking statute nor was it recognized under federal law.

Finally, defense counsel asserted that even if the concept of conditional intent was adopted by the court, there was no evidence that petitioner shared such a conditional intent with Lennon. Counsel argued that the absence of proof that Lennon ever communicated his intention to hurt a victim who resisted his carjacking efforts to petitioner and the complete lack of evidence that petitioner independently harbored such an intent compelled the court to grant the Rule 29 motion. (223-227).

The government opposed defense counsel's motion and argued that the concept of conditional intent is valid and that, on this level of culpability, the government presented sufficient evidence to warrant the case going to a jury. (228).

The Court denied the Rule 29 motion and ruled that conditional intent was applicable to the facts of the case. The court held that an intent to inflict death or serious bodily harm, should it become necessary, was sufficient to establish the specific intent required by the statute. (234).

The Court's Charge

The court rejected all defense arguments in opposition to the theory of conditional intent and instructed the jury on the concept as follows:

The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done willfully, with a bad purpose to do something the law forbids, in this case, to cause death or serious bodily harm to the person from whom the car was taken.

It is the defendant's theory of the case that the evidence fails to prove that he acted with intent to cause death or serious bodily harm.

If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious bodily harm to the particular victim, you must find him not guilty of that offense.

The defendant is entitled to the presumption of innocence with regard to all of the elements of the offense including this element. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or serious bodily harm at the time of the events you are considering.

Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the

facts you may consider in determining whether the government has met its burden.

You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.

In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Let me also remind you, you must consider each count separately." J.A. 19-21 (emphasis added).

During deliberations, the jury sent out a note that stated they needed a copy of the law on intent. J.A. 23. In responding to the note, the court once again instructed the jury on its concept of conditional intent. J.A. 27-31.

The Verdict

Appellant was found guilty of all eight counts charged against him in the indictment.

The Post Verdict Motion

On April 5, 1996, the district court denied petitioner's renewal of his Rule 29 motion, made pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In a written opinion, the court adhered to its original decision sustaining the government's proof on the basis of the concept of conditional intent. J.A. 32-47.

The Sentence

At sentencing, on August 16, 1996, the court sentenced petitioner to a sentence of 60 months on his conviction under the conspiracy to operate a chop shop count; concurrent sentences of 151 months on his conviction under the chop shop and carjacking counts; and consecutive sentences totaling an additional 45 years on his convictions under the § 924(c) counts.

A timely notice of appeal was filed. Petitioner is currently serving his sentence in the custody of the Bureau of Prisons.

The Second Circuit Court of Appeals Decision

On September 16, 1997, the Second Circuit Court of Appeals upheld petitioner's conviction and, in a majority opinion, held that the court's instruction on conditional intent was correct.

The circuit court found that the concept of conditional intent to harm is included within the definition of specific intent. Notwithstanding the absence of any precedent in federal law, the majority relied on state law and the Model Penal Code (which has never been adopted by

the federal courts) as support for finding conditional intent to be included within the concept of specific intent.

Finally, although the majority stated that it was not attempting to rewrite a poorly drafted statute, the court wrote, "Furthermore, and most importantly, incorporating conditional intent within the specific intent language of the statute comports with the reasonable interpretation of the legislative purpose of the statute." J.A. 63.

In a carefully worded dissenting opinion, Judge Miner found no basis in the plain language of the statute or in its legislative history to support expanding the mental culpability required for the commission of the crime of carjacking to include conditional intent. J.A. 67-73. Judge Miner reasoned that the language of the statute was clear and unambiguous. Further, Judge Miner found that the Congressional record failed to contain sufficiently persuasive information to support a conclusion that the heightened intent requirement added by the 1994 amendment to the crime was an "unintended drafting error." J.A. 69. Moreover, Judge Miner wrote that even if the heightened intent requirement was an inadvertent legislative mistake, the Supreme Court has long held that "to supply omissions (to a statute) transcends the judicial function." *Id.* (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)).

Finally, Judge Miner stressed that there exists no basis in federal law which permits the expansion of specific intent to include the concept of conditional intent. The two are clearly different states of mind. Thus, despite assertions to the contrary, in finding that the carjacking statute encompassed the conditional intent to cause

serious injury or death, the majority effectively redrafted the law.

The opinion and holding of the Second Circuit conflicted with the holding of the Ninth Circuit in *United States v. Randolph*, 93 F.3d 656 (9th Cir. 1996). The Third Circuit in *United States v. Anderson*, 108 F.3d 478 (3d Cir.), cert. denied, 118 S. Ct. 123 (1997), and the Tenth Circuit in *United States v. Romero*, 122 F.3d 1334 (10th Cir. 1997), have upheld the concept of conditional intent and applied it to the crime of carjacking. In *United States v. Lake*, 972 F. Supp. 328 (D.V.I. 1997), the district court adopted the concept of conditional intent and in *United States v. Craft*, 1996 U.S. Dist. LEXIS 18964, 1996 WL 745527 (E.D. Pa. Dec. 23, 1996), the district court rejected the theory.

On April 27, 1998, this Court granted certiorari.

Summary of Argument

Petitioner contends that both the Second Circuit Court of Appeals and the Eastern District Court committed reversible error when they interpreted the carjacking statute to encompass a conditional intent to cause serious bodily harm or death. The statute passed by Congress in 1994 expressly added the requirement of an intent to cause serious bodily harm or death as an element of the crime. Petitioner contends that the plain language of the statute must be interpreted in accordance with its terms. Moreover, although neither legislative history or public policy can be relied on to support a different conclusion, both the legislative history and public policy support petitioner's argument.

In addition, petitioner also contends that the concept of conditional intent has no basis in federal criminal law and cannot be applied to petitioner's case. Furthermore, petitioner contends that the instructions provided to the jury on conditional intent were unconstitutionally defective.

Finally, even if the Court were to find some support for the proposition that the carjacking statute encompasses a conditional intent to cause serious bodily harm or death, principles of lenity would require the Court not to enforce such an interpretation against the petitioner.

ARGUMENT

PETITIONER'S CONVICTION MUST BE REVERSED BECAUSE THE REQUIREMENT OF AN INTENT TO CAUSE SERIOUS BODILY HARM OR DEATH CONTAINED IN THE CARJACKING STATUTE CANNOT BE INTERPRETED TO ENCOMPASS CONDITIONAL INTENT

The issue before the Court is whether the express definition of intent contained in a criminal statute can be expanded and replaced by a reduced level of mental culpability. Because such an exercise necessarily requires judicial intervention into the reach of an unequivocally worded statute, it cannot be allowed.

In deciding the meaning and reach of a federal criminal law, a number of irrefutable guidelines have emerged. First and foremost the language of a statute is examined. Thus, in this case where the statute provides that the defendant must possess a specific intent to cause death or serious bodily harm as an element of the offense, there is

no room for debate concerning the mens rea required for conviction.

The ruling of the Second Circuit failed to adhere to this fundamental tenet. Its decision holding that the federal carjacking statute encompasses a conditional intent to cause serious bodily harm or death must be reversed because: (1) the holding patently contravenes the plain and unequivocal language of the carjacking statute; (2) the decision introduces an entirely novel concept of mental culpability into federal criminal law; (3) the legislative history of the carjacking statute provides no support for introducing the concept of conditional intent into the statute; (4) persuasive policy reasons simply do not exist to expand the reach of an essentially unambiguous criminal statute; (5) longstanding principles of lenity require this Court not to construct the statute against petitioner; and (6) the district court erroneously instructed the jury on the concept of conditional intent.

I. The Statutory Language of the Carjacking Statute is Clear and Unequivocal

In 1992, Congress passed the Anti Car Theft Act, Pub. L. No. 102-519, 106 Stat. 3384, which read as follows:

Whoever, possessing a firearm . . . takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall. . . . (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both. (Codified at 18 U.S.C. § 2119.)

During 1993, an amendment to the statute was adopted by Congress and the statute now reads as follows:

Whoever, with the intent to cause death or serious bodily harm . . . takes a motor vehicle . . . from the person or the presence of another by force, and violence or by intimidation, or attempts to do so, shall. . . . (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.²

The language of the amended statute is neither complex nor difficult to grasp. Indeed, there is simply no mystery as to the statute. As amended, the statute eliminated the requirement that a weapon be possessed and added the element that the perpetrator have the intent to cause death or serious bodily harm. Although no longer requiring that the perpetrator possess a firearm, the added requirement that the perpetrator possess the intent to cause death or serious bodily harm transformed the statute from a general intent crime into a specific intent offense. *United States v. Randolph*, 93 F.3d 656 (9th Cir. 1996); *United States v. Rivera-Gomez*, 67 F.3d 993 (1st Cir. 1995). In addition, the statute provides for the imposition

² The law was enacted in the following provision of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1970:

"(14) CARJACKING - Section 2119(3) of Title 18, United States Code, is amended by striking the period after "both" and inserting, "or sentenced to death"; and by striking, "possessing a firearm as defined in section 921 of this title", and inserting, "with the intent to cause death or serious bodily harm."

of the death penalty where the crime results in the death of a person.

It is beyond cavil that the first canon of statutory construction is "a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, a court has no choice but to apply a statute in accordance with its terms. Indeed, unless a literal reading of a statute would "lead to absurd or futile results" or completely frustrate the obvious Congressional intent, the words of a statute must be taken as the final expression of its purpose. *United States v. American Trucking Ass'ns* 310 U.S. 534, 543 (1940).

Thus, the Court has held that when the words of a statute are unambiguous, this first canon of statutory construction is also the last. *Rubin v. United States*, 449 U.S. 424, 430 (1981). Judicial inquiry is complete when the provisions of a statute and the elements of a crime are readily discernible and easily understood. *Rubin v. United States*, *supra*. "Unless otherwise defined, [statutory] words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

These rules of construction simply leave no room to interpret the amendments to the 1994 carjacking statute in any manner other than their obvious and unequivocal terms. The law contains no omissions or gaps or lack of clarity as to the intent element. Indeed, any attempt to manipulate the language of the statute or to expand upon it can only be viewed as an attempt to alter a law enacted

by Congress to better suit the taste of the presiding tribunal. *Caminetti v. United States*, 242 U.S. 470 (1917).

It is also incontestable that the elements of a criminal offense are created by the legislature, particularly in the case of federal crimes, which are solely creatures of statute. *Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Thus, when Congress has expressly defined the mental state required for the commission of a crime, the statute must be interpreted in accordance with its unequivocal language. *Cf. Liparota v. United States*, 471 U.S. at 424.

In all cases where the Court has grappled with the mens rea required by a criminal statute, the rule of first priority has always been that federal crimes are defined by Congress. Therefore, as long as Congress acts within its constitutional power, the Court "must give effect to Congress' expressed intention concerning the scope of conduct prohibited." *United States v. Kozminski*, 487 U.S. 931, 939 (1988); see also *Dowling v. United States*, 473 U.S. 207, 213-14 (1985); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). The courts "should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

In determining the issue of mental culpability, the Court has never expanded the concept of intent beyond the clear language of the statute. Accordingly, while the Court has required a higher level of mens rea than the language of the law expressly required, the Court has never required a lower level of mens rea than required by

a statute. *Staples v. United States*, 511 U.S. 600 (1994); *Cheeks v. United States*, 498 U.S. 192 (1991); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Morrisette v. United States*, 342 U.S. 246 (1952).

In holding that government has the burden of proving intent, notwithstanding the absence of an express mens rea element in the statute, the Court has consistently stressed that "Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and 'absence of contrary direction will be taken as satisfaction with widely accepted definitions, not as a departure from them.'" *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (quoting *Morrisette v. United States*, 342 U.S. 246, 263-(1952)).

In petitioner's case, the amended statute expressly provides (rather than omits) a standard of mens rea which has a widely accepted application in federal criminal law. The government attempts to minimize this clear expression of Congressional will by advocating the creation of a conditional concept of mens rea. But conditional intent is not contained in the language of the statute, is a novel standard of mens rea in federal law and has no basis in the precedents established by the Court.

In ruling on the meaning of the intent element within federal criminal statutes, the Court has never recognized the concept of conditional intent. Indeed, both general and specific intent are clearly recognized as the state of mind actually possessed by the perpetrator at the time of

commission of the crime. Intent, whether general or specific, is never defined as a possible state of mind which could emerge in the future upon the existence of a conditional state of affairs. Consequently, the Court has always defined intent in an unconditional manner. *United States v. Bailey*, 444 U.S. 394 (1980); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

In sum, there is no precedent of the Court in which the expressly stated and traditionally understood mens rea language contained in a statute has been expanded to include the novel concept of conditional intent. The element of specific intent contained in the carjacking statute articulates a state of mind which could not be more clearly and unambiguously set forth. A specific intent to cause serious bodily harm thus speaks for itself and allows only for the single interpretation that serious bodily harm or death is the conscious intention and design of the perpetrator. By refusing to adhere to the language of the statute and introducing a novel conditional intent standard of culpability, the district court committed error which requires the reversal of petitioner's conviction.

II. The Legislative History Does not Support the Court's Interpretation of the Statute

The language of the carjacking statute is unequivocal. Therefore, the legislative history of the statute need not be evaluated, as there is no confusion as to its meaning. *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). Furthermore, if it is necessary to resort to

legislative history to interpret a statute, that interpretation should err in favor of the defendant. As the Court said in *Hughey v. United States*, 495 U.S. 411, 422 (1990), "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." (Internal citations omitted). Although the Court should not use the legislative history to resolve any "ambiguity against (the) petitioner," in this case the scant legislative history fully supports petitioner.

As there was no textual support for the lower court's ruling that conditional intent satisfied the intent element of the statute, the court was reduced to quoting legislative history to support its erroneous holding. In particular, the lower court quoted Sen. Lieberman who said, "We need to broaden (the Carjacking) law that we adopted last year to cover all carjackings, not simply armed carjackings, and to provide prosecutors with the option of seeking the death penalty if an innocent person dies." 139 Cong. Rec. S5821 (daily ed. May 12, 1993). But these remarks were made on behalf of a *different* crime bill, S. 942, which was introduced a year earlier than the one at issue in this case. Not only did that bill have no language regarding intent, but it *was never passed* by either House of Congress. Therefore, the comments of Sen. Lieberman are *totally irrelevant* to the Congressional intent behind the specific intent element embodied in the enacted carjacking statute. Similarly, Representative Franks' comment that the crime bill "will make an additional 22

crimes including carjacking and drive-by shootings, subject to the death penalty," 140 Cong. Rec. E858 (daily ed. May 5, 1994), also provides no support for the lower court's holding regarding conditional intent, because the intent element had not yet been added to the statute.

Although this Court cannot use the comments of legislators speaking about bills that were never passed as guidance for Congress' intent, it can use the language of the bills that the individual houses passed as some guidance. Neither the Senate version of the crime bill (S. 1607), nor the House version of the crime bill (H.R. 3555) contained the intent element. Rather the intent element was added after the House and Senate met to reconcile their differences regarding the crime bill. The first mention of the intent language was in the committee report which stated that the Senate agrees to "the addition of an intent standard for carjacking." H.R. Rep. No. 103-694, at 418 (1994).

Because this report came out of committee, a written record of any debate which led to its introduction does not exist. The fact that the language encompassing a heightened intent requirement was utilized instead of the proposed Senate bill which contained no language concerning intent, however, can only be interpreted to mean that a narrowing of the scope of the initially proposed amended law was desired by Congress.

Although it is clear that Congress meant to add a heightened intent standard to the carjacking statute, the Second Circuit believed that Congress mistakenly added the intent requirement to non-death penalty cases

because the amendment to the carjacking statute begins by stating that "Subsection (3) of Section 2119(3) of title 18 (the punitive provision of the statute providing for the death penalty) is amended." 108 Stat. at 1970. But the Second Circuit noted that Congress actually added the intent element and withdrawal of the firearms requirement to the main text of the statute and not "Subsection (3)." J.A. 58.

This curious fact, however, lends no support for metamorphosing the concept of specific intent into conditional intent. Although the Second Circuit correctly noted that it should "decline(s) any invitation to redraft the statute – that is a task better left to the legislature," *id.*, it then did precisely that by redrafting the statute to include conditional intent.

Moreover, if the Second Circuit was correct that Congress' purpose was to only add a specific intent requirement to the death penalty section of the statute then the circuit court's utilization of conditional intent as a proxy for specific intent is patently illogical. It is preposterous to presume that Congress would introduce the concept of conditional intent into death penalty legislation without: (a) supplying any statutory language to that effect; (b) having any discussion taking place as to its existence; or (c) having any dialogue or debate regarding the constitutionality of permitting such a state of mind to be used as the basis for the execution of a defendant.

In sum, there is simply nothing in the legislative history of the amended carjacking statute which provides any support for expanding the law by changing the intent requirement to include conditional intent. Therefore, the

decision of the Second Circuit and the district court to alter and revise the meaning and language of the statute cannot be sustained.

III. Persuasive Policy Reasons Do Not Exist to Expand the Expressly Stated Mens Rea Requirement of the Statute

There are compelling policy reasons for concluding that in adding the heightened intent requirement to the main text of the carjacking statute, Congress intended to impose a significant limitation on the scope of the law. The elimination of the firearm element of the carjacking statute would have broadened federal jurisdiction to all 35,000 carjackings occurring each year if some additional limitation was not placed on the elements of the offense. In light of the concerns of Senator Biden and other legislators that the elimination of the firearm requirement was further diluting the already attenuated federal nexus of this traditional state crime, the addition of the requirement that the perpetrator intend to cause serious physical injury or death as part of the statutory definition of the offense advances important federalism principles. 139 Cong. Rec. S15,302 (daily ed. Nov. 8, 1993) (statement of Sen. Biden); *see also* 139 Cong. Rec. S15,524-26 (daily ed. Nov. 10, 1993) (statement of Sen. Leahy); *see also* 140 Cong. Rec. H2325-26 (daily ed. Apr. 14, 1994) (statement of Rep. Scott).

Although as previously noted, Senator Lieberman and Representative Franks made statements during the legislative process in support of legislation which would

have amended the carjacking statute in a virtually unlimited manner, the remarks of the legislators did not address the heightened intent statute which was ultimately enacted into law. Thus, it can hardly be argued that the public policy goals underlying the statute are best served by stretching the statute to federalize all carjackings.

Congress has never enacted a criminal statute containing an express or implied conditional intent provision. It is only when a defendant contemplates conduct in the future that his purposes can be conditional because the purposes that accompany a completed criminal act, however conditional they once were, become unconditional at the point of the crime's commission. Thus, whatever a carjacker's purposes and intentions might have been had his crime been resisted, it is only the purpose and intent he possessed when the act was actually committed which is at issue in determining his culpability for the completed crime.³

In a completed crime, any conditionality of a defendant's original purpose is immaterial because those purposes have become either unconditional or non-existent upon the commission of the crime. Any intention he would have possessed if other conditions were present, at

³ Petitioner was convicted of carjacking notwithstanding the complete absence of proof that he ever intended to cause serious bodily harm to anyone when he and his accomplice forcibly obtained their vehicles. Indeed, the proof at trial established that the defendant's true desire and purpose in perpetrating the crimes which they actually committed was to obtain the vehicles they acquired without having to harm their victims. J.A. 36.

best, can only be a subject of prosecution in the case of an inchoate crime, such as solicitation or an incomplete attempt. Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. Crim. L. & Criminology 1138 (1997).

The government in its opposition to the petition for certiorari argued that a conditional intent should apply, however, to the particular crime of carjacking because of the statute's prohibition against taking a vehicle "by force and violence or by intimidation." The government contends that because it would be difficult to prove such an unconditional intent in any case in which the carjacker did not in fact do violence to the victim, petitioner's argument would essentially read the phrase "or by intimidation" out of the statute.

The government's argument misconstrues the logical and straight-forward statute which Congress chose to enact. The intent to cause serious bodily harm or death defines the state of mind which a defendant must possess while taking a victim's vehicle. The taking of the vehicle by force and violence or by intimidation quite obviously describes the conduct which the statute prohibits. It is simply incorrect to contend that requiring the government to prove that a perpetrator possessed the specific intent to cause serious bodily harm or death at the time of the taking of the vehicle reads intimidation out of the statute. For example, a defendant who fires a shot at the driver of a vehicle and misses and who consequently succeeds in taking the vehicle by virtue of the intimidating impact of such behavior has certainly manifested an intent to cause serious bodily harm. Likewise, a perpetrator who threatens a driver in order to take the driver's

car and then shoots the driver after obtaining the car has taken the vehicle by intimidation as well as exhibiting a specific intent to cause serious bodily harm and will be liable under the statute.

In short, the government's argument implicitly rests on the specious premise that the infliction of actual injury constitutes the only evidentiary basis upon which a jury could find a specific intent to cause serious bodily harm. Rather than constituting the only evidence of an intent to cause serious harm, although probative, actual injury merely represents one of several potential pieces of evidence which are probative of the perpetrator's intent.

The government's argument that conditional intent is necessary because the statute includes acts of intimidation is therefore untenable. The contention that intimidation can only encompass conditional intent is simply flawed.

If the decision of the Second Circuit is affirmed and conditional intent is accepted as a proxy for a specific intent to cause death or serious bodily harm then, in effect, the federal carjacking statute has been made coextensive with analogous state statutes. But making federal carjacking statutes coextensive with existing state law statutes contravenes the expressed Congressional desire to impose some limitation on the intervention of the federal courts into traditional state law crimes.

Interpreting the statute to require a showing of a specific intent to seriously harm a person would confine the law to those persons who set out to take a vehicle

from their victims with a specific intent of harming their victims. The only individuals who would escape prosecution under the federal law would be those offenders who had no intention of harming anyone and only desired to steal an automobile. Any criminal who intends to seriously injure his victim is within the reach of the statute. On the other hand, the carjacker who only intended to seize a vehicle without harming the victim of the crime could still, of course, be prosecuted in state court.

If conditional intent is accepted, however, particularly in light of the elimination of the firearm requirement of the offense, the only carjacking which would not be subject to federal prosecution would be the situation where a carjacker could show that even if the victim had resisted the perpetrator, the perpetrator would not have inflicted any harm. Because such a scenario could only realistically be shown to exist if the victim resisted and the carjacker decided not to commit his crime, conditional intent would essentially read the specific intent to cause serious bodily harm right out of the statute.

In sum, it is far more consistent with both the purpose of the statute and public policy to interpret the amended carjacking statute as a law which was enacted to permit federal intervention only into those carjackings, armed and unarmed, where the perpetrator possessed an actual intent to cause serious bodily harm or death. The heightened intent requirement properly confines carjackers who did not intend to inflict serious injury on their victims to the jurisdiction of the state courts. Thus, in addition to the language and legislative history of the statute, the interests of public policy and the principles of

federalism are best served by refusing to distort the scope of the law.

IV. The District Court Erroneously Instructed The Jury on The Elements of the Concept of Conditional Intent

The Second Circuit cited the Model Penal Code for its contention that conditional intent satisfied the intent element of the carjacking statute. But the Model Penal Code also addresses the need for the prosecution to establish the defendant's awareness of the circumstances which trigger his conditional intent or his hope that such circumstances will exist. The district court did not, however, require the prosecution to establish the defendant's awareness.

The Model Penal Code states that:

A person acts purposely with respect to a material element of an offense when:

- 1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- 2) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or believes or hopes that they exist.

Model Penal Code § 2.01(2)(a).

Thus, under this definition, in addition to the object or result of a defendant's conduct, the Model Penal Code also requires as an element of acting purposely that the

prosecution prove knowledge of the existence of the circumstances underlying the crime. In addition, Model Penal Code 2.02(7) provides that "when knowledge of the existence of a particular fact is an element of the offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." See *United States v. Dworken*, 855 F.2d 12, 18-19 (1st Cir. 1988) (holding that liability under a conditional intent theory would only attach if a defendant "reasonably believed" that the conditions would obtain).

In petitioner's case, the district court claimed that it was following the Model Penal Code but failed to address the issue of knowledge and belief regarding whether resistance would be encountered in the course of the carjacking.

Thus, the jury was never charged on the question of whether petitioner had even a reasonable belief that in carrying out the charged carjackings he would be met by such resistance that he would have to resort to inflicting serious bodily harm or death upon one of his victims. Consequently, even in the event this Court accepts the government's theory of conditional intent, the trial court's failure to charge the jury on the issue of the defendant's belief as to the existence of the conditions which was the prerequisite for his intent to cause serious bodily harm requires the reversal of petitioner's conviction. See also Paul A. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond* 35 Stan. L. Rev. 681 (1983).

In addition, the issue of the defendant's awareness of the existence of the conditions which trigger the conditional intent is a two part objective/subjective test. As a threshold issue, the government must establish that there is a high probability *i.e.* a reasonable belief that the defendant's offense will be met by resistance. *United States v. Dworken*, 855 F.2d 12 (1st Cir. 1988). Once this is proven, the prosecution still has the burden of proving that the defendant subjectively believed that resistance is likely. Since the probability of the conditions are an essential element of the defendant's mens rea, his subjective belief is certainly at issue. *Cf.*, *Arave v. Creech*, 507 U.S. 463, 473 (1993); *see also People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986) (the words "reasonably believe" embody elements which are subjective (*i.e.*, what the actor believes) as well as objective (*i.e.*, whether a reasonable person could have had these beliefs)).

The district court's charge to the jury was thus flawed in two essential respects. First, the court failed to charge the jury that the government was required to prove beyond a reasonable doubt that, viewed objectively, there was a probability of resistance. Second, the court also failed to instruct the jury on the government's burden to prove beyond a reasonable doubt that petitioner subjectively believed in the high probability of his conduct being met by resistance which would elicit his otherwise dormant intent to cause serious bodily harm. Therefore, the court's defective instructions requires the reversal of petitioner's conviction. *In re Winship*, 397 U.S. 358, 364 (1970).

In sum, the district court failed to comprehensively develop the guidelines and essential principles of the

theory of conditional intent and failed to properly instruct the jury on this novel concept. Thus, the jury could not properly apply conditional intent to the facts of the case. Thus, even if the total absence of conditional intent from the language of the statute is somehow overlooked, the district court's failure to provide the jury with essential tools to enable them to meaningfully apply the concept requires the reversal of petitioner's conviction.

V. Fundamental Principles of Lenity Require that the Statute be Applied in Accordance with its Express Language

Even if this Court were to reject all of petitioner's arguments concerning the completely unambiguous language and meaning of the carjacking statute, the legislative history which clearly supports the petitioner's arguments and the public policy reasons why the Court should not adopt conditional intent, the rule of lenity would still require the Court to reverse petitioner's conviction.

The government, by proposing a concept of mens rea which has never previously existed in federal criminal law and arguing that a specific intent to cause serious bodily harm instead means a conditional intent to cause such injury, has at best created ambiguity in the statute. Because "[t]he Court has emphasized that the touchstone of lenity is statutory ambiguity," *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (internal quotation omitted); and that once a statutory ambiguity is shown "that conclusion should end the matter," *United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring); the government's expansive interpretation of the carjacking statute cannot be permitted to stand.

Moreover, if the legislature wishes to impose a level of culpability which goes beyond a specific intent to cause serious harm than the Court should leave it to Congress to speak "in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)).

Finally, "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant . . . preclude [the Court's] resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." *Hughey v. United States*, 495 U.S. 411, 421 (1990) (internal citation omitted). Therefore, the Court should reverse petitioner's conviction.

CONCLUSION

The language of the amended carjacking statute, its legislative history, longstanding concepts of federal criminal jurisprudence, public policy, and principles of lenity all lead to the same result. The intent to cause death or serious bodily harm element of the amended carjacking statute requires the government to prove beyond a reasonable doubt that a defendant possesses an intent to cause death or serious bodily harm. The government's failure to present such proof and the district court's decision not to instruct the jury regarding such a requirement

compels the reversal of petitioner's convictions of all carjacking and § 924(c) counts.

Respectfully submitted,

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